

The opinion in support of the decision being entered today was **not** written
for publication and is **not** binding precedent of the Board.

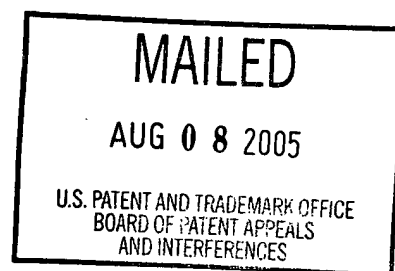
UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte Roland A. Wood

Appeal No. 2005-1239
Application No. 09/893,066

ON BRIEF



Before DIXON, LEVY, and SAADAT, **Administrative Patent Judges**.

DIXON, **Administrative Patent Judge**.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-18,
which are all of the claims pending in this application.

We REVERSE AND REMAND.

BACKGROUND

Appellant's invention relates to a sensor for dual wavelength bands. An understanding of the invention can be derived from a reading of exemplary claim 1 which is reproduced below.

1. A dual wavelength focal plane comprising:

a first array of infrared sensing microbolometer pixel elements;

a second array of visible light pixel elements responsive to selective colors encountered while driving an automobile such that traffic control colors are optimally sensed.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Cooper	6,150,930	Nov. 21, 2000
Ouvrier-Buffer et al. (Ouvrier-Buffer)	6,320,189	Nov. 20, 2001 (filed Jul. 13, 1999)

The following reference has not been applied against the claims and we do not consider it in our decision on the merits.

Kern et al.	4,296,324	Oct. 20, 1981
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Rather than reiterate the conflicting viewpoints advanced by the examiner and appellant regarding the above-noted rejections, we make reference to the answer (mailed Oct. 4, 2004) for the examiner's reasoning in support of the rejections, and to

the brief (filed Aug. 9, 2004) and reply brief (filed Dec. 8, 2004) for appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we make the determinations which follow.

At the outset, we note that the examiner states that "[t]he appellant's statement of the issues in the brief is substantially correct. The changes are as follows: The reference Kern et al. (4,296,624) which was introduced in the last Office Action as evidence and reply to the amendments and arguments made by the Applicant, is also relevant and, as before, will be relied upon." We find no statement of the reliance upon this reference in the ground of the rejection. Where a reference is relied on to support a rejection, whether or not in a minor capacity, that reference should be positively included in the statement of the rejection. **See In re Hoch**, 428 F.2d 1341, 1342 n.3 166 USPQ 406, 407 n. 3 (CCPA 1970). (See also MPEP 706.02(j).)

35 U.S.C. § 103

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness. **See In re Rijckaert**, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A *prima facie* case of obviousness is

established by presenting evidence that the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the references before him to make the proposed combination or other modification. **See In re Lintner**, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972). Furthermore, the conclusion that the claimed subject matter is *prima facie* obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention. **See In re Fine**, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). Rejections based on § 103 must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the prior art. The examiner may not, because of doubt that the invention is patentable, resort to speculation, unfounded assumption or hindsight reconstruction to supply deficiencies in the factual basis for the rejection. **See In re Warner**, 379 F.2d 1011, 1017, 154 USPQ 173, 177 (CCPA 1967), **cert. denied**, 389 U.S. 1057 (1968). Our reviewing court has repeatedly cautioned against employing hindsight by using the appellant's disclosure as a blueprint to reconstruct the claimed invention from the isolated teachings of the prior art. **See, e.g., Grain Processing Corp. v. American Maize-Prods. Co.**, 840 F.2d 902, 907, 5 USPQ2d 1788, 1792 (Fed. Cir. 1988).

When determining obviousness, "the [E]xaminer can satisfy the burden of showing obviousness of the combination `only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references.'" **In re Lee**, 277 F.3d 1338, 1343, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002), citing **In re Fritch**, 972 F.2d 1260, 1265, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992). "Broad conclusory statements regarding the teaching of multiple references, standing alone, are not 'evidence.'" **In re Dembiczak**, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). "Mere denials and conclusory statements, however, are not sufficient to establish a genuine issue of material fact." **Dembiczak**, 175 F.3d at 999-1000, 50 USPQ2d at 1617, citing **McElmurry v. Arkansas Power & Light Co.**, 995 F.2d 1576, 1578, 27 USPQ2d 1129, 1131 (Fed. Cir. 1993).

Further, as pointed out by our reviewing court, we must first determine the scope of the claim. "[T]he name of the game is the claim." **In re Hiniker Co.**, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998). Therefore, we look to the language of independent claim 1. Independent claim 1 requires "a first array of infrared sensing microbolometer pixel elements" and "a second array of visible light pixel elements. . . ." The examiner maintains that Cooper teaches the use of both first and second arrays of pixel elements and Ouvrier-Buffet teaches the well known use of bolometers. (Answer at page 4.)

Appellant argues that Cooper only teaches a single array of pixels and the examiner's reliance upon the readout registers is in error. (Brief at page 5.) We agree with appellant that Cooper only teaches the use of a singular array of pixel elements. The examiner maintains that appellant misconstrues the claim language and that appellant also has a singular array with "two independent and separate pixel layers." The examiner further maintains that

interpreting the claims only as claimed, we arrive at a focal plane that has one or more IR pixels and one or more visible light pixels positioned either linearly or in a matrix (because an array means either a linear or matrix arrangement of one or more elements). Thus, even without relying on the disclosure interpretation, the reference Cooper does disclose the two arrays of pixels as claimed, because its dual wavelength focal plane 34 includes a plurality of pixels where some pixels are visible light pixels and some are infrared light pixels. The fact that the Cooper focal plane has its plurality of pixels arranged linearly (in one row) instead of a matrix (row and columns) has no bearing on the claiming of an array of pixels. Thus, the array structure as claimed is indeed present in the Cooper reference. (Answer at pages 8.)

We disagree with the examiner and find no disclosure in Cooper of "its dual wavelength focal plane 34" nor that the CCD 34 includes "a plurality of pixels where some pixels are visible light pixels and some are infrared light pixels." Furthermore, we agree with appellant that it is the claim language with respect to the two arrays of pixels which the examiner must address. (Reply brief at pages 3-5.) Here, we find the examiner's factual findings with respect to Cooper to be in error and therefore the examiner has not met the initial burden of establishing a *prima facie* case of obviousness, and we cannot

sustain the rejection of independent claims 1, 8, 15, 16, and 18 and their dependent claims which contain similar limitations with respect to the two arrays.

With respect to independent claim 10, we find no limitation to the use of two arrays of pixel elements. Therefore, we do not rely upon the above deficiency to reverse the examiner rejection. Moreover, appellant only presents arguments with respect to the sensing of the infrared radiation with a microbolometer as discussed with claims 1-7. While we make no findings with respect to the use of the microbolometer since the examiner relies upon the additional teachings of the Kern reference, we note that the examiner relies upon the teachings of Cooper with respect to displaying the sensed data in a color display. (Cooper at col. 5, lines 18-22.) We find no teaching or the use of a "heads up display" as recited in the language of independent claim 10. Therefore, the examiner has not established a *prima facie* case of obviousness, and we cannot sustain the rejection of independent claim 10 and its dependent claims.

REMAND

As discussed above, we make no findings with respect to the Kern reference, but we do note it is of interest. Therefore, we remand the application to the examiner to consider officially applying the teachings of Kern and to consider the obviousness of a "heads up display" in place of the CRT of Cooper. Additionally, the examiner may want to further consider the teachings of Ouvrier-Buffer as to the reliance upon sensing both IR and visible light simultaneously.

Appeal No. 2005-1239
Application No. 09/893,066

CONCLUSION

To summarize, the decision of the examiner to reject claims 1-18 under 35 U.S.C. § 103 is REVERSED.

REVERSED AND REMANDED

Joseph L. Wilson

JOSEPH L. DIXON
Administrative Patent Judge

Stuart S. Levy
STUART S. LEVY

STUART S. LEVY
Administrative Patent Judge

Maxwell D. Quilley

MAHSHID D. SAADAT
Administrative Patent Judge

BOARD OF PATENT
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